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No. 00 367

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

AARON DARIA, ***Petitioner***

v.

GARY LINDSEY, ***Respondent***

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 27, 2000

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QUESTIONS PRESENTED

I.

WHETHER DUE PROCESS REQUIRES THAT THE *SANTOBELLO* STANDARD OF REVIEW BE APPLIED WHERE THE TRIAL COURT SENTENCED DEFENDANT TO A TERM SUBSTANTIALLY GREATER THAN THAT PROMISED AT THE TIME OF PETITIONER'S GUILTY PLEA, WITHOUT ADVISING PETITIONER, ON THE RECORD, THAT THE COURT COULD WITHDRAW ITS PROMISE AND THAT, IF IT DID, PETITIONER WOULD BE ABLE TO WITHDRAW HIS PLEA.

II.

WHETHER IT VIOLATES DUE PROCESS TO APPLY THE *TIMMRECK* STANDARD OF PREJUDICE TO ERROR BY THE SENTENCING COURT WHICH LEADS TO A BREACH OF THE PLEA BARGAIN.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

I.
WHETHER DUE PROCESS REQUIRES THAT THE *SANTOBELLO* STANDARD OF REVIEW BE APPLIED WHERE THE TRIAL COURT SENTENCED DEFENDANT TO A TERM SUBSTANTIALLY GREATER THAN THAT PROMISED AT THE TIME OF PETITIONER'S GUILTY PLEA, WITHOUT ADVISING PETITIONER, ON THE RECORD, THAT THE COURT COULD WITHDRAW ITS PROMISE AND THAT, IF IT DID, PETITIONER WOULD BE ABLE TO WITHDRAW HIS PLEA.

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WHETHER IT VIOLATES DUE PROCESS TO APPLY THE *TIMMRECK* STANDARD OF PREJUDICE TO ERROR BY THE SENTENCING COURT WHICH LEADS TO A BREACH OF THE PLEA BARGAIN.

OPINION BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 1

STATEMENT OF THE CASE 2

Proceedings in California Superior Court 2

Proceedings on Direct Appeal in California Courts 9

Proceedings on Habeas Corpus 11

REASONS FOR GRANTING THE PETITION 15

I. 15

II. 24

TABLE OF CASES

Cases	Page
Boykin v. Alabama, 395 U.S. 238 (1969)	22
Hill v. Lockhart, 474 U.S. 52, 56 (1985)	1
In re Tahl, 1 Cal.3d 12(1969)	22
Mabry v. Johnson, 467 U.S. 505, 509 (1984)	1
Nash v. Israel, 533 F.Supp. 1378 (E.D. Wis. 1982)	28
People v. Walker, 54 Cal.3d 1013 (1991)	18-20
Santobello v. New York, 404 U.S. 257 (1971)	2, 17, 20-21, 24, 28
United States v. Baylin, 695 F.2d 1030 (3d. Cir. 1982)	28
United States v. Henry, 713 F. Supp. 1182 (N.D.Ill. 1989)	26
United States v. Pogue, 865 F.2d 226 (10th Cir. 1989)	27-28
United States v. Timmreck, 441 U.S. 78, 784 (1979)	15, 16, 24-28
United States v. Walsh, 733 F.2d 31, 33 (6th Cir. 1984)	27, 28
Statutes & Rules	
Cal. Pen. Code § 1192.5	2, 6, 9, 10, 12, 14-18, 20-25, 30
28 U.S.C., § 1254(1)	1
28 USC § 2253	1
Rule 22, Rules of Appellate Procedure	1

PETITION FOR A WRIT OF CERTIORARI

Petitioner AARON DARIA respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reproduced in the Appendix (Appx. A, pp. i-iii), as is the opinion by the California Court of Appeal (Appx. C, pp. vii-xxi).

JURISDICTION

The Court of Appeals entered its judgment on March 31, 2000. The jurisdiction of the Court is invoked under 28 U.S.C., § 1254(1). Jurisdiction below was invoked pursuant to 28 USC § 2253 and Rule 22, Rules of Appellate Procedure.

PROVISIONS OF LAW INVOLVED

The Due Process clause of the Fifth Amendment to the U.S. Constitution requires that a defendant's plea be voluntary and intelligent, and cannot be the result of misrepresentations or improper promises. *Hill v. Lockhart,* 474 U.S. 52, 56 (1985); *Mabry v. Johnson,* 467 U.S. 505, 509 (1984). Imposition of a sentence significantly harsher than that which petitioner reasonably understood to be a part of the plea bargain is contrary to this court's holding in *Santobello v. New York,* 404 U.S. 257

(1971). These principles are applied herein to a failure of a trial judge to engage in the on-the-record, pre-plea colloquy required by California Penal Code § 1192.5. (§ 1192.5 reproduced in Appx. E, p. xxviii.)

STATEMENT OF THE CASE

Petitioner seeks certiorari following the denial of his petition for federal habeas corpus relief from his plea of guilty and subsequent sentence in the California State Court to a term of 17 years in prison, plus a consecutive life term. Petitioner's claim is that he was denied Due Process, because the imposition of a *consecutive* life term violated the terms of his plea bargain, by which the court led Petitioner to reasonably believe that he would receive a *concurrent* life term in exchange for his guilty plea.

Proceedings in California Superior Court

On June 16, pursuant to a plea agreement, Petitioner entered nolo contendere pleas to 16 felony counts, including one count of attempted murder. The charges arose out of the shooting of one Eric Calica and a string of armed robberies taking place over a six-month period during which Petitioner was 16 years old. (California Court of Appeal opinion, Appx. pp. vii-xxi; see also RT 6/16/94, pp. 3 et seq.)

With regard to the attempted murder charge, the shooting of

Calica had occurred several months before Petitioner's arrest on the robberies, and the Calica case had been closed after the police had been unable to identify a suspect. Even though Calica and other eyewitnesses had identified the shooter as one of four "black males" -- whereas Petitioner was a light-skinned Filipino -- Petitioner volunteered during police questioning that he had shot Calica, whom Petitioner was acquainted with and independently knew to have been the victim of a shooting. His confession occurred in the course of an aggressive police interrogation, during which Petitioner, only 16 years old and having never been previously charged with a serious offense, was heavily under the influence of alcohol and drugs, was not represented by counsel, and was not permitted to have his parents present. During this same interrogation, Petitioner also admitted to committing at least one robbery (Denny's restaurant, 10/22/93) for which he had an iron-clad alibi. (See Traverse, Docket #12, pp. 6-9.) Apart from Petitioner's confession, there was no evidence linking him to the attempted murder, and the only robbery for which there was solid eyewitnesses testimony identifying Petitioner as the perpetrator was the last one, during which Petitioner was apprehended. (*Ibid.*)

With Petitioner and his co-defendants claiming that their

confessions had been coerced, the case proceeded to trial. However, on June 16, 1994, as jury selection was taking place, Petitioner consented to a plea bargain. Pursuant to the terms of the bargain, Petitioner agreed to plead nolo contendere to 16 counts, including the attempted murder count. The prosecution agreed to dismiss the remaining counts and did not oppose an "indicated" sentence by the court of 28 years determinate, plus a life term on the attempted murder that would run concurrently with the determinate sentence. (RT 6/16/94, pp. 6-7.) That the latter sentence limitation -- imposition of a concurrent life term on the attempted murder count (Count 1) -- had been the principal inducement for Petitioner's change of plea, was reflected by the fact that the printed change-of-plea form which Petitioner was required to sign, contained the following hand-written entry following the words "I have not been induced to plead guilty or nolo contendere by any promise or representation of a lesser sentence ... *except* ..."

> *The court has indicated that I will be sentenced to 28 years in determinate terms with the sentence on ct. 1 to run concurrent. That is, the life term in ct. 1 plus any special allegations attached to ct. 1 will be imposed to run concurrently with the 28 years indeterminate terms imposed ..."*

This prominent hand-written entry appeared directly above a printed paragraph in small print which stated: "The Court reserves

the right to withdraw its consent to any sentence limitation agreement; and, in the [sic.] event, I will be permitted to withdraw my plea(s) ... and all charges will be reinstated." (See change of plea form, reproduced in Appx., pp. xxix-xxx.)

At the change-of-plea hearing on June 16, 1994, the trial court first took, on the record, Petitioner's personal waiver of his trial rights, and advised Petitioner of the maximum sentence he was facing. Then, although the court prefaced its remarks by saying that it was an "indicated" sentence, the court stated to Petitioner on the record:

> You *will* be sentenced to 28 years with respect to the determinate terms, with the sentence on Count 1, that is the life term, together with those special allegations to run concurrent to the earlier term. By that, I mean the life term plus the special allegations of eight years *will be imposed to run concurrently* with the 28 years of the determinate sentence ... to be imposed ...

(RT 6/16/94, at p.6 [emphasis added].) The court asked Petitioner, "Is that your understanding", to which Petitioner said "Yes". The court then inquired whether "any *other* promises, inducements, or representations [have] been made to get you to enter this plea of no contest". Petitioner answered "No". (RT 6/16/94, p. 8.) At this point the court took a stipulation that there was a factual basis for the plea, and found that the plea was the product of a "knowing, intelligent, free and voluntary waiver".

(RT 6/16/94, pp. 9-16.) However, contrary to the mandatory provisions of California Penal Code § 1192.5, at no time prior to Petitioner's entry of the plea did the judge inform him on the record that its approval of the indicated sentence was not binding, that the court might withdraw its approval upon further consideration, or that, if the court did withdraw its approval of the sentence, Petitioner would be permitted to withdraw the plea if he so desired. (Pen. Code § 1192.5 is reproduced in its entirety at Appx., p. xxii.)

After Petitioner had pled guilty but prior to sentencing, a juvenile named Foia Tanlieu was apprehended while trying to escape from the juvenile facility where Petitioner was housed. At the time, Tanlieu was armed with a handgun which had been smuggled into the facility by a relative of one of the inmates. At first Tanlieu claimed that a person other than Petitioner had given him the gun, but later Tanlieu agreed to implicate Petitioner in exchange for immunity from prosecution on the escape charges.

The People admitted that they did not have enough evidence to prosecute Petitioner for the escape. However, the day before the sentencing hearing, the People filed a "People's Sentencing Memorandum" which stated that the People would now be seeking a *consecutive* life sentence on Count 1. This document

further indicated that the People would be calling Tanlieu as a witness at Petitioner's sentencing hearing, to testify that Petitioner had been responsible for bringing in the handgun to the juvenile facility.

On February 10, 1995, the sentencing hearing took place. At the outset of the hearing, the court did not make any statement on the record suggesting to Petitioner that the court was now considering withdrawing its earlier approval of the concurrent life term, nor was Petitioner examined on the record to determine whether he was aware that the court had withdrawn its prior approval of the indicated sentence; or whether, if so, Petitioner desired to withdraw his plea and proceed to trial. Rather, the court merely confirmed that the district attorney would be calling Tanlieu and that his testimony was "unrelated" to the charges on which Petitioner was to be sentenced, and permitted Tanlieu to be called to the stand. (RT 2/10/95, at p. 26.)

Tanlieu did testify that Petitioner had brought in a gun for his escape attempt, but the record also reveals that Tanlieu was the person actually caught with the weapon concealed within his buttocks; that when first asked about the weapon Tanlieu had not said anything at all about Petitioner, but rather claimed that the weapon belonged to another individual named Ortega, and that it

was Ortega who was going to use the gun to escape; and that, contrary to Tanlieu's suggestion at the hearing that Petitioner's relatives had something to do with bringing in the weapon, the police reports indicated that the gun was actually smuggled in by "Wayne Vaka's aunt". (RT 2/10/95, pp. 40-49.) The trial judge himself questioned Tanlieu's credibility at the sentencing hearing, saying: "It is difficult to totally place great weight in Mr. Tanlieu's testimony only from the standpoint that I recognize his background, where he is coming from, and the bargain he is receiving for that." (RT 2/10/95, at 81.)

At the conclusion of the hearing, the court asked if there was legal cause why sentence should not be pronounced. Defense counsel referred to the court's having a "great deal of discretion in the matter, obviously with the imposition of the sentence in Count 1 which is a life term" (RT 2/10/95, at 72); but counsel did not state that the previously indicated "concurrent" life sentence had been withdrawn or was being reconsidered. After defense counsel argued for a concurrent life term, the district attorney purported to "disagree", and argued for a consecutive life sentence. The court, still without telling Petitioner that it was able to or was considering withdrawing its previous representation of a concurrent life sentence, then permitted Petitioner to speak. In a

statement taking up just a few lines in the transcript, Petitioner said that he was very sorry for what he had done and asked forgiveness. The court then imposed a *consecutive* life term on Count 1. (*Id.*, at 85.)

Proceedings on Direct Appeal in California Courts

On direct appeal, Petitioner argued, *inter alia*, that the consecutive life sentence violated the terms of the plea bargain and Penal Code § 1192.5, which requires the court to tell the defendant in open court and on the record that the sentence "indicated" at the time of the plea could later be withdrawn, in which event defendant would be able to withdraw the plea. Consequently, Petitioner argued that his plea was not knowing and intelligent, because he had been induced to plead guilty based what he reasonably believed to be a "promise" that the court had, without his knowledge, withdrawn. Petitioner sought relief via specific performance or an opportunity to withdraw the plea.

In an opinion originally published in the official reports, the California Court of Appeal acknowledged that the trial court had failed to advise Petitioner, as required by § 1192.5, that its approval of the indicated sentence was only conditional and could be withdrawn; and, referring extensively to the record, found that Petitioner "reasonably ... believed that the 'indicated sentence'

agreed to by the district attorney and accepted by the court was part of the bargain and therefore assured"; and that, as a result, the plea had *not* been shown to be "intelligent and voluntary". (Court of Appeal Opinion, Appx. pp. xi-xviii [em. added].) Nevertheless, because the prosecution had dismissed the counts it had agreed to dismiss, and because the trial judge had sentenced Petitioner within the maximum sentence allowed by law for the counts to which Petitioner was pleading guilty, the Court of Appeal concluded that the plea agreement had not been violated, but rather that Petitioner "was not adequately advised of the range of permissible sentences." (Appx. at xviii-xx.). Characterizing the imposition of a consecutive life sentence instead of a concurrent life term in this fashion -- rather than as a violation of the plea bargain -- the court applied a harmless-error test which put the burden on Petitioner. Applying this test, the Court of Appeal determined that Petitioner had not proved prejudice and affirmed the conviction and consecutive life sentence. *Ibid.*

Petitioner then sought review of this claim in the California Supreme Court. On Dec. 23, 1996, the California Supreme Court denied review, but at the same time ordered the Court of Appeal opinion be "depublished". (See Appx., p. vii.)

Proceedings on Habeas Corpus

Petitioner continued to press his claims on collateral review, first on state habeas corpus and then in the federal habeas corpus petition whose denial is the subject of this petition for certiorari. Originally proceeding *pro se,* Petitioner substituted in present counsel in federal court to file a First Amended Petition for Habeas Corpus (ER 21-31) and subsequently, a Traverse and accompanying exhibits. (ER 33-37.). Both the First Amended Petition and the Traverse contained only the single claim that Petitioner's constitutional right to due process of law had been violated by the manner in which Petitioner's plea was taken and the opportunity for withdrawal of the plea denied.

On Dec. 3, 1998, the district court denied the petition in an Order that included two sections, entitled: "(A) Court's failure to inform Petitioner that he could receive a consecutive sentence before entering his plea does not violate constitutional due process"; and "(B) Petitioner has failed to show that he was prejudiced by the state court's omission under section 1192.5." (Appx. D, pp. xxii-xxvii.) In § A, the district judge found that the imposition of a consecutive sentence is a "collateral consequence"of a plea, and that therefore a judge need not advise the defendant prior to accepting a plea that it "might" impose, or that the defendant "could" receive, a consecutive sentence. In §

B, the district judge acknowledged that the trial court had violated § 1192.5 when it failed to advise Petitioner that its approval of the plea was not binding, and that if approval were withdrawn in light of further considerations subsequent to taking the plea, that the plea could be withdrawn. However, as had the state Court of Appeal, the court found that this "omission" was "not per se a due process violation"; applied a harmless-error test placing the burden on Petitioner; and found that Petitioner had failed to affirmatively show prejudice. (*Ibid.*)

On January 8, 1999, Petitioner filed an Application for Certificate of Appealability with the District Court. In his COA application, Petitioner agreed with § A of the district judge's order – that a failure to advise of the possibility of a consecutive sentence is a collateral consequence that does not amount to a due process violation – but challenged the district judge's finding in § B. Petitioner drew a constitutional distinction between a trial judge's naked failure to advise of the *possibility* of a consecutive sentence; and – as occurred here – a judge's positive indication on the record that it actually *will* impose a concurrent sentence; followed by a lack of any advice to the defendant on the record that the court could withdraw its agreement to impose the concurrent term, that it was actually going to withdraw its

approval, or that if it did withdraw its prior approval of a concurrent term, defendant could then withdraw his plea of guilty. As argued by Petitioner in his application for COA, this was far more than a mere "technical" failure to advise on a collateral consequence of the plea, but rather a violation of one of the essential *inducements* for the plea in the first place, which therefore destroyed the voluntary character of the plea and infringed upon Petitioner's constitutional right to Due Process. Hence, Petitioner argued that he had indeed been "prejudiced" and that the petition for habeas corpus should have been granted.

On May 19, 1999, the District Court foreclosed any inquiry on appeal into whether Petitioner's rights were violated because of the trial judge's failure to specifically advise him that a consecutive sentence "could" be imposed. However, the district judge *granted* the COA on the issue Petitioner had raised regarding § "B" of the district judge's prior order, and therefore certified for appeal the following question: "Whether Petitioner was prejudiced by the state court's failure to advise petitioner in accordance with California Penal Code § 1192.5." (Appx., pp. iv-vi.)

In a brief Memorandum Opinion filed on March 31, 2000, the Ninth Circuit Court of Appeal denied the petition for habeas

corpus. The court found it "undisputed that the trial court had failed to advise Daria orally of his rights under Section 1192.5." (Appx., at p. ii.) However, relying on *United States v. Timmreck*, 441 U.S. 78, 784 (1979), the court found that this was "not a per se federal constitutional due process violation" and that Petitioner was therefore only entitled to relief if he could show "prejudice". Applying this test, the Ninth Circuit held: "We find no prejudice because the record shows that Daria had been advised in writing, pursuant to a change-of-plea form that he acknowledged as having read and understood, of the rights defined in Section 1192.5." Hence, the court affirmed the denial of the petition for habeas corpus.

Within 90 days of the Ninth Circuit's decision denying him habeas corpus relief, Petitioner timely submits this Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

(Roman numerals correspond to "Questions Presented")

I.

The 9th Circuit opinion expressly found: "It is undisputed that the trial court failed to advise Daria orally of his rights under Section 1192.5." (Appx., at ii.) However, the court reasoned: (a) that the error was "not per se a constitutional violation"; (b) that *United States v. Timmreck, supra*, holds that "collateral relief is

unavailable when 'all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure' "; and (c) that, applying the *Timmreck* standard, the court could "find no prejudice because the record shows that Daria had been advised in writing, pursuant to a change-of-plea form that he acknowledged as having read and understood, of the rights defined in Section 1192.5." (Appx., p. 3.)

In sum, the 9th Circuit panel found: (a) that the trial court's failure to orally advise Petitioner of his rights under § 1192.5 did not violate Petitioner's constitutional rights; (b) that *Timmreck* therefore applies to require that Petitioner demonstrate "prejudice" from the violation of his § 1192.5 rights; and (c) that, because Petitioner was advised of those rights in the written change-of-plea form, Petitioner could not show the prejudice required for habeas corpus relief under *Timmreck*.

As will be shown below, each of these three core conclusions by the 9th Circuit panel was erroneous. Correlating to the Questions Presented on this Petition for Certiorari, here in § I, Petitioner demonstrates the 9th Circuit was required to apply the standard of review set forth in *Santobello v. New York*, 404 U.S. 257, 262 (1971); and that, applying *Santobello*, Petitioner is entitled to habeas corpus relief. In section II, *infra*, Petitioner

argues that the 9th Circuit erred in applying the *Timmreck* standard to the facts here, and that the court erred in finding that the written plea agreement precluded Petitioner from establishing the "prejudice" required to invalidate his guilty plea.

Preliminarily, it is significant that § 1192.5 is a *mandatory* provision of California law which *requires* an extensive pre-plea colloquy between the court and the defendant in open court, but that trial courts such as the one in this case use boiler-plate change-of-plea forms which contain in printed form the same explanation the court is required by § 1192.5 to give orally. Hence, the question arises as to why the on-the-record colloquy between the judge and the defendant is mandatory at all if it merely re-states what is already contained in the written change-of-plea forms. The only reasonable answer is that there is something inherent in the oral colloquy between the defendant and the court at the time of the plea that the California Legislature has deemed so important that it *cannot* be reliably conveyed solely by the boiler-plate language in a pre-printed change-of-plea form.

Indeed, this is essentially what the California Supreme Court, seeking to rectify confusion in the California appellate courts about the effect of a trial court's failure to give the § 1192.5 admonishment on the defendant's fundamental rights, explained

in the leading case of *People v. Walker,* 54 Cal.3d 1013 (1991), an authority recognized and cited by the 9th Circuit in its own opinion. (See Appx., at p. ii, citing *Walker.*)

In *Walker*, applying federal constitutional analysis, California's highest court explained that there are two potential kinds of violations of § 1192.5 -- one an error involving "advisement of the consequences of the plea" and the other involving "violation of the plea bargain" -- and that the latter type of error implicates constitutional rights that are not necessarily violated by the former.

As *Walker* explains, the first type of § 1192.5 omission involves a mere failure to advise the defendant of certain "consequences" of the plea. Such an omission may or may not be significant, depending on whether or not the defendant would have entered the plea if advised of the omitted consequence. In constitutional terms, the omission of such advice merely violates a "judicially declared rule of criminal procedure", and is therefore non-constitutional error that requires an affirmative "showing of prejudice", namely a credible showing by the defendant that "it is reasonably probable he would not have entered the plea if he had been told about [the omitted consequence]." *Walker, supra*, at p. 1023.

The second type of error involves "violation of the plea bargain": Where a guilty plea is entered in exchange for "specified benefits", those benefits *must* be conferred, because "the punishment may not significantly exceed that which the parties agreed upon." Unlike the mere failure to advise as to the consequences of the plea, a failure to carry out promises made in the plea bargain *does* deny a defendant his constitutional rights because: "Due process applies not only to the *procedure* of accepting the plea, but ... also to the *implementation* of the plea bargain itself. It necessarily follows that violation of the plea bargain ... raises a constitutional right to some remedy." *Walker, supra,* at p. 21, citing *Santobello* [emphasis added]. Thus, violation of the plea bargain ("*Santobello* error") *is* an error of constitutional dimension, and "is not subject to harmless error analysis". However, there is one caveat: Not just any deviation from the terms of the plea agreement is constitutionally impermissible; rather, the "variance must be 'significant' in the context of the plea bargain as a whole to violate the defendant's rights." *Id.*, at 1024.

Nevertheless, lest the "significance" requirement obliterate the distinction between *Santobello* error and the non-constitutional omission of advice as to a "consequence" of the plea, *Walker*

emphasized that the "significance" test is "stricter" than the prejudice test for mere failure to advise as to the plea's consequences:

> Courts should generally be cautious about deeming nonbargained punishment to be insignificant. *The test whether a punishment greater than that bargained for is "significant" under* Santobello *... is stricter than the prejudice test for a mere failure to advise of the consequences of a nonbargained plea.* Punishment that is not prejudicial, i.e., when it is not reasonable probable the defendant would not have pleaded guilty if informed of the punishment ... may well be "significant" if imposed after a negotiated plea.

Walker, supra, at p. 1028, fn.3 [emphasis added].

Thus, applying the constitutional teachings of *Walker* to the question posed by the C.O.A -- whether Petitioner was "prejudiced" by the lack of oral advisement per § 1092.5 -- the 9th Circuit *should* have asked and answered the following questions: (1) Did the sentencing court's failure to engage in the on-the-record colloquy with Petitioner that is required by § 1192.5 lead to the violation of the plea bargain? and (2) If so, was the sentence imposed "significantly" harsher than the sentence promised at the time of the plea?

Indeed, affirmative answers to *both* of these questions are provided in the findings in § II of the opinion by the California Court of Appeal. Summarized below are the numbers corresponding to each question in the above paragraph and the

"answers" contained in the findings of the Court of Appeal, which, under the AEDPA, must be accepted unless found to be "unreasonable":

(1) "The defendant must be explicitly advised, as is ordinarily done, that an 'indicated sentence' does not constitute a guarantee. From all that appears in the record, by which we are bound, appellant never received such an advisement and might therefore *reasonably have believed that the 'indicated sentence' agreed to by the district attorney and accepted by the court was part of the bargain and therefore assured.*" (State Court Opinion, Appx. at xviii [emphasis added].)

(2) "... [T]he *sentence actually imposed was significantly harsher than the 'indicated sentence'* earlier described to appellant by the court." (*Id.*, Appx. at ix [em. added].)

These findings by the state court are reasonable, sensible, and reflect the practical realities of plea bargaining, whereby the defendant is expected to understand all the elements of the plea bargain but is usually (as Petitioner was here) unschooled in technical legal jargon.

As regards (1), the purpose of the oral § 1192.5 advisement is to make sure that the court explains to the defendant in open court, on the record, and in plain English just what the terms of the plea

bargain are. In this way, any ambiguities in the boilerplate language of the printed change-of-plea form can be clarified; the court can discuss specific conditions in the individual plea, which are more meaningful to the defendant than the generic, legalistic language on the written form; and if there is a subsequent dispute about the terms of the bargain there will be an accurate appellate record for review. *In re Tahl,* 1 Cal.3d 122, 130 (1969), citing *Boykin v. Alabama,* 395 U.S. 238 (1969). In short, the court must tell the defendant plainly, face-to-face, and on the record, the precise benefits he will receive in exchange for his plea of guilty; and -- at least in states such as California where the plea is conditional upon the fulfillment of the promises made at the time of the plea -- that those promises will be kept or that, if the court later contemplates withdrawing those inducements, the defendant will be given fair notice and afforded the opportunity to withdraw his plea and go to trial.

These essential and practical requirements are at the heart of § 1192.5. Nevertheless, in the instant case, the court did *not* tell the defendant what § 1192.5 requires to be said on the record, but instead told Petitioner at the time of the plea simply that he "will" receive a "concurrent" life term in exchange for his plea to a disputed count of attempted murder. Thus by failing to explain to

defendant on the record that the court could later change its mind and that, if it did so, the defendant could withdraw his plea, the court effectively "assured" Petitioner that the "indicated" sentence would be the sentence imposed. In fact the Court of Appeal so found when it concluded that, as a result of the court's flawed colloquy with Petitioner, Petitioner was reasonably led to believe that the sentence "indicated" at the time of the plea was "assured as part of the bargain." (Court of Appeal opinion, § II, Appx. at xi et seq.)

As regards finding (2), a consecutive life sentence is obviously substantially longer than a concurrent life term and the Court of Appeal properly so found.

In sum, based on the actual findings by the California Court of Appeal, which have not been shown to be erroneous or "unreasonable" anywhere on this record, the lack of a § 1192.5 advisement in this case amounted to *Santobello* error; such error implicates constitutional rights and is therefore reversible so long as the sentence imposed was "significantly" longer than the sentence promised; and that is precisely what occurred here. Thus, the 9th Circuit should have applied *Santobello* and found prejudicial *Santobello* error, and its failure to do so requires that the Petition for Certiorari be granted.

II.

In addition to fatally erring by failing to apply the *Santobello* standard to the error here (see § I, *supra*), the 9th Circuit further erred by applying the *Timmreck* standard of prejudice instead; and, applying that inapplicable standard, by finding that Petitioner could not show prejudice because the written change-of-plea form supposedly contained everything the trial court was required to orally impart to Petitioner under the mandatory provisions of § 1192.5.

The 9th Circuit panel did correctly state -- and we do not dispute -- *Timmreck*'s holding "that collateral relief is unavailable when 'all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure." (Appx., at p. iii.) However, the instant case does *not* involve merely the omission of "formal" requirements of the guilty plea. Instead, as shown in the previous section, what happened here is that the court told Petitioner at the time of the plea that he "will" receive a certain sentence (a concurrent life term) and, by omitting the § 1192.5 admonishment, did not tell him that the court might later change its mind and impose a substantially longer sentence (a consecutive life term), which is what the court actually did. Therefore, as a result of non-compliance with § 1192.5, the court *misled*

Petitioner into reasonably (although wrongly) believing that he was "assured" of a concurrent life term in exchange for his plea.

Using *Timmreck's* language, the court's failure to give the § 1192.5 advice here was not merely an omission to advise of the "formal" requirements of the plea. Rather, the court assured Petitioner at the time of the plea that he "will" receive a sentence that was substantially shorter than the one the court later imposed. As shown above, this led to an unconstitutional failure to "implement" the plea bargain -- an error of constitutional dimension -- rather than simply a technical violation of a judicially declared rule of "procedure", which was at issue in *Timmreck*. Succinctly stated, where, as here, a petitioner makes a showing of "constitutional error -- a violation of due process", then "any 'harmless error' approach drawn from *Timmreck* would be of doubtful applicability." See, e.g., *United States v. Henry*, 713 F. Supp. 1182 (N.D.Ill. 1989).

Applying the general principle stated immediately above, several federal courts have specifically found that *Timmreck* is not applicable to cases involving breach of a plea bargain.

For example, in *United States v. Walsh*, 733 F.2d 31, 33 (6th Cir. 1984) the court pointed out that "*Timmreck* did not involve a criminal defendant who pled guilty in exchange for a specific

sentence, or received a sentence longer than he bargained for." Hence, the "correct test to be used in determining whether the circumstances surrounding [a] negotiated guilty plea violated the Due Process Clause is *[whether] the sentence actually imposed ... significantly differed from the sentence which the prosecutor and the trial court promised him." Ibid* [emphasis added]. Notably, this equates perfectly to the *Santobello* standard which, as shown in § I, the 9th Circuit should have employed, but did not.

In *United States v. Pogue*, 865 F.2d 226 (10th Cir. 1989), the court granted a motion to vacate a sentence where the defendant, at the time of his plea, was advised that he would have to pay a fine of $2,000, but not about the possibility of restitution, which the court later ordered in an amount exceeding $1 million. The government invoked *Timmreck* to justify the sentence, but the circuit court refused to apply it on several grounds pertinent here. First, the court pointed out that in *Timmreck* the sentence actually imposed did not exceed that which the court had told the defendant it "might" impose. Likewise, in our case the court did not tell Petitioner it "might" impose a sentence greater than the one it said it "will" impose. Second, in *Timmreck* the defendant "did not argue that he was actually aware of the potential sentence or that, if he had been properly advised by the trial judge, he would

not have pleaded guilty. His only claim was of a technical violation ...". By contrast, in *Pogue*, the defendant had alleged that he wouldn't have taken the plea if he'd known of the sentence the court was going to impose. *Pogue, supra,* at p. 229. Similarly, Petitioner here has specifically alleged in his habeas corpus petition that he "would not have pleaded guilty if he had been advised that the 'indicated sentence' was merely provisional or that the court could actually sentence Petitioner consecutively to the life term on count 1." (First Amended Petition, ¶ 4.) Third, the § 2255 motion in *Timmreck* was denied only after an evidentiary hearing, but in *Pogue* the motion was denied "without a hearing or comparable evidentiary development, and therefore without an opportunity to examine the possibility of prejudice." *Ibid*. The same is true of Petitioner, whose petition was summarily denied without an opportunity to prove his allegation that he would *not* have taken the plea if properly advised.

In sum, *Timmreck* applies to cases in which the habeas claim is merely based on a technical or formal omission in the *procedure* of taking a plea, but *not* to a failure in the *implementation* of the plea bargain itself -- which occurred here. *Walsh, supra; Pogue, supra.* See also: *United States v. Baylin,* 695 F.2d 1030 (3d. Cir. 1982) [where technical claim of Rule 11 violation is

"subsidiary claim to the larger one that the terms of his agreement with the Government were abrogated because he received a sentence longer than he had bargained for ... we do not think *Timmreck* is dispositive"]; *Nash v. Israel,* 533 F.Supp. 1378 (E.D. Wis. 1982) [*Santobello* requires "strict adherence to the specific and express terms of the plea agreement"; *Timmreck* is inapplicable to such claims because "there, technical defects did not create a due process violation".]

Finally, contrary to what the 9th Circuit found, the written plea agreement signed by Petitioner does not substitute, in the constitutional sense, for the court's failure to explain to Petitioner at the time of the plea that the sentence the court said was going to give was only conditional or provisional, and that Petitioner had the right to notice and the opportunity to withdraw his plea if and when the court decided to impose a substantially longer sentence than the one previously assured. Indeed, the California Court of Appeal considered and *rejected* the argument that the written plea agreement could plug the gap in Petitioner's understanding of the plea that was created by the court's failure to engage in the oral colloquy required by § 1192.5. (Appx., at xv-xiii.) As can be readily seen from the reproduction of the form (Appx., pp. xxix-xxx), it is filled with handwritten annotations that reinforce the

very same impression given by the court in the deficient oral exchange with Petitioner at the time of the plea: namely that the sentence "indicated" by the court was in fact part of the bargain. Although the written change of plea form uses the words "the court has indicated ..." as a preface to the specification of a concurrent life term, right after the word "indicated" is an ellipse, followed by a new sentence which states: "I *will* be sentenced to 28 years in determinate terms with the sentence on ct. 1 to run concurrent." That same unconditional language is employed a second time in the very next sentence: "That is, the life term ... attached to ct. 1 *will* be imposed to run concurrently ..." Finally, preceding this entire handwritten portion is the statement that "I have not been induced to plead guilty or nolo contendere by any promise or representation of a lesser sentence ... or anything else *except* ... [concurrent life term specified].

Thus, the handwritten portions of the change-of-plea form, rather than providing a cogent explanation of Petitioner's rights which substituted for what the court omitted to explain as required by § 1192.5, actually *reinforced* the reasonable (albeit technically erroneous) impression which the court's oral statements to Petitioner, absent the § 1192.5, conveyed: i.e., that imposition of the concurrent life term was, indeed, approved as part of the

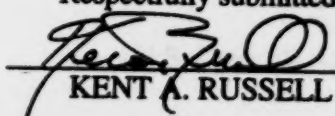
bargain, and consequently was a "promise " that had to be honored. Accordingly, and contrary to the 9th Circuit's conclusion, there is nothing in the written form that dispels the "prejudice" caused to Petitioner by the court's misleading oral assurance that a concurrent life term would be imposed in exchange for Petitioner's guilty plea.

CONCLUSION

For all the reasons stated herein, the petition for certiorari should be granted and the case briefed and heard on the merits.

Dated: August 18, 2000

Respectfully submitted:



KENT A. RUSSELL

Counsel of record for Petitioner
AARON C. DARIA

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

AARON DARIA, ***Petitioner***

v.

GARY LINDSEY, ***Respondent***

On Petition For A Writ Of Certiorari

APPENDIX

A.
Memorandum Opinion:
Daria v. Lindsey
U.S. Court of Appeals for the Ninth Circuit.
pp. i-iii

B.
Certificate of Appealability:
U.S. District Court for the Northern District of California
[Hon. Thelton Henderson].
pp. iv-vi

C.
State Court Decision:
People v. Daria, 56 Cal.Rptr. 2d 291 [depublished]
California Court of Appeal.
pp. vii-xxi

D.
District Court Opinion:
U.S. District Court for the Northern District of California
[Hon. Thelton Henderson].
pp. xxii-xxvii

E.
Cal. Penal Code § 1192.5
p. xxviii

F.
Change of Plea Form
pp. xxix-xxx

Appendix A
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 31 2000

CATHY A. CATTERSON, CLERK US. COURT OF APPEALS

AARON DARIA, Petitioner-Appellant,

v.

GARY LINDSEY, Respondent-Appellee.

No. 99-16090
D.C. No. CV-97-02121-THE

MEMORANDUM [fn.1]

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted March 13, 2000
San Francisco, California

Before: O'SCANNLAIN, RYMER, and W. FLETCHER, Circuit Judges

California state prisoner Aaron Daria appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. The district court certified the following issue as the sole issue for appeal:

---------- Footnote----------

fn.1: This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

----------End Footnote----------

Whether petitioner was prejudiced by the state court's failure to advise petitioner in accordance with California Penal Code § 1192.5.

We have jurisdiction under 28 U.S.C. § 2253, and we AFFIRM.

I.

We review de novo the district court's denial of a state prisoner's habeas petition. See Houston v. Roe, 177 F.3d 901, 905 (9th Cir. 1999), cert. denied, 120 S.Ct. 1168 (2000). Because Daria filed his habeas petition after April 23, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies. See Jeffries v.Wood, 103 F.3d 827, 827 (9th Cir. 1996) (en banc). Under the AEDPA, we have jurisdiction to review only those issues that have been certified for appeal. See 28 U.S.C.§ 2253(c).

II.

Section 1192.5 of the California Penal Code requires the trial court to inform a defendant prior to accepting his nolo-contendere plea (1) that the count's acceptance of the plea is non-binding, (2) that the court may withdraw its approval of the plea after further consideration, and (3) that the defendant may withdraw his plea if the court withdraws its approval. See CAL. PENAL CODE § 1192.5; People v. Walker, *54* Cal.3d 1013, 1024-25 (1991). It is undisputed that the trial court failed to advise Daria orally of his rights under Section 1192.5.

Because the violation of a state rule of criminal procedure is not a per se federal constitutional due process violation, Daria is entitled to federal habeas relief only if he can show that he was unconstitutionally prejudiced by the trial court's violation of Section 1192.5. See United States v. Timmreck, 441 U.S. 780. 784 (holding that collateral relief is unavailable when "all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure); Carter v. McCarthy, 806 F.2d 1373, 1376 n.2 (9th Cir. 1986); Wayne v Raines, 690 F.2d 685, 687 (9th Cir. 1982). We find no prejudice because the record shows that Daria had been advised in writing, pursuant to a change-of-plea form that he acknowledged as having read and understood,

of the rights defined in Section 1192.5. Cf. Peguero v. United States, 119 5. Ct. 961, 963 (1999) ("We hold that a district court's failure to advise the defendant of his right to appeal does not entitle him to habeas relief if he knew of his right and hence suffered no prejudice."); United States v. Dawson, 193 F.3d 1107, 1111(9th Cir. 1999) (finding no prejudice because the defendant knew that he was waiving his right of confrontation and his privilege against self-incrimination by pleading guilty even though the district court failed to advise him of these nights).

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
MAY 19, 1999

RICHARD W. WIEKING
CLERK U.S DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AARON DARIA,

Petitioner,

v.

GARY LINDSEY,

Respondent.

NO. C 97-2121 THE

CERTIFICATE OF APPEALABILITY

This matter comes before the Court on petitioner's application for a certificate of appealability which would allow him to challenge this Court's order denying his petition for a writ of habeas corpus. Petitioner sought to overturn his plea on the grounds that it was not entered knowingly and voluntarily. The Court previously ruled that the state court's failure to inform petitioner, prior to entering his plea, that he could receive a consecutive sentence rather than a concurrent sentence, did not violate his constitutional due process rights. *Daria v. Lindsey,* No. C 97-2121 THE PR, 1998 WL 856078, *2 N.D. Cal. Dec. 3, 1998). The Court also held that petitioner was not prejudiced by the state court's failure to inform him, pursuant to California Penal Code § 1192.5, that he could withdraw his plea when the court imposed a harsher sentence than that "indicated" at the plea hearing. *Id.* at *3.

According to 28 U.S.C. § 2253, a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must also indicate which issue or issues satisfy the required showing. 28
U.S.C. § 2253(c)(3). As the Supreme Court has explained in a similar context:

> "In requiring a 'question of some substance,' or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.' " *Gordon v. Willis,* 516 F. Supp. 911, 913 (N.D. Ga. 1980) (citing *United States ex rel. Jones V. Richmond,* 245 F.2d 234 (2d Cir.), *cert. denied,* 355 U.S. 846, 78 5. Ct 71, 2 L. Ed. 2d 56 (1957)).

Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 3394-95 n.4, 77 L. Ed. 2d 1090 (1983).

The Court will not certify for appeal the question whether petitioner's plea was rendered unconstitutional by the state court's failure to advise him that a consecutive sentence could be imposed. It is beyond peradventure that imposition of a consecutive sentence is within the discretion of the sentencing judge and is therefore a "collateral" consequence of entering a plea of guilty. To satisfy constitutional requirements, petitioner need only have been advised of "direct" consequences. *See Brady V. United States,* 397 U.S. 742, 749, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). However, the Court will and HEREBY DOES CERTIFY FOR APPEAL the following issue:

> Whether petitioner was prejudiced by the state court's failure to advise petitioner in accordance with California Penal Code § 1192.5.

Petitioner has met his burden under 28 U.S.C. § 2253 as to this issue.

IT IS SO ORDERED.

DATED: 5/19/99

s/ Thelton E. Henderson
THELTON E. HENDERSON,
UNITED STATES DISTRICT COURT

Appendix C

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

AARON C. DARIA,
Defendant and Appellant.

No. A070696

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE

DISTRICT, DIVISION TWO

48 Cal. App. 4th 1278; 1996 Cal. App. LEXIS 811; 56 Cal. Rptr. 2d 291; 96 Cal. Daily Op. Service 6386; 96 Daily Journal DAR 10361

August 23, 1996, Filed

NOTICE: [**1] NOT CITABLE - ORDERED NOT PUBLISHED.

COUNSEL: Eric Liberman, for Defendant and Appellant.

Daniel E. Lungren, Attorney General; George Williamson, Chief Assistant Attorney General; Ronald A. Bass, Senior Assistant Attorney General; Ronald S. Matthias, Supervising Deputy Attorney General; Martin S. Kaye, Deputy Attorney General, for Plaintiff and Respondent.

JUDGES:
KLINE, P.J.; LAMBDEN, J., and HITCHENS, J. *, concurring.

* Judge of the San Francisco Superior Court sitting under assignment by the Chairperson of the Judicial Council.

OPINION BY: KLINE

OPINION:

[*1282]
[***293] KLINE, P.J.:

Aaron Carnelius Daria appeals from convictions entered upon pleas of nolo contendere on sixteen criminal counts. He claims his sentence of a consecutive life term on count 1, attempted murder, violates a plea bargain under which he was to receive a concurrent sentence for that count.

STATEMENT OF THE CASE AND FACTS

On March 24, 1994, an information was filed charging appellant with 33 felony counts. n1 These included one [**2] count of attempted murder (Pen. Code, § 664/187), n2 fourteen counts of assault with a deadly weapon (§ 245, subd. (a)(2)), one count of attempted robbery (§ 664/212.5), eight counts of robbery (§ 212.5), seven counts commercial burglary (§ 460, subd. (b)), and single counts of automobile theft (Veh. Code, § 10851, subd. (a)), and [*1283] conspiracy (§ 182.1). The facts of the underlying offenses, which occurred between August 13, 1993 and November 12, 1993, are not relevant to the issues on appeal.

----------Footnotes----------

n1 Appellant was 16 years old at the time of the underlying offenses. The juvenile court found he was "not a fit and proper subject to be dealt with under the juvenile court law" pursuant to Welfare and Institutions section 707. Accordingly, appellant has been sentenced in the criminal court as an adult.

n2 All further statutory references are to the Penal Code unless otherwise specified.

----------End Footnotes----------

On June 16, 1994, an amended information was filed. The same day, appellant pleaded nolo contendere to 16 counts of the [**3] amended information as follows: Count 1, attempted murder with use of a firearm and infliction of great bodily injury (§§ 664/187, 12022.5, 12022.7); counts 4, 8, 9, 14, 20, and 22, robbery with use of a firearm (§§ 212.5, 12022.5); counts 25 and 28, robbery while armed with a firearm (§§ 212.5, 12022, subd. (a)(1)); counts 18, 19, 30, and 31, assault with a deadly weapon while armed with a firearm (§§ 245, subd. (a)(2), 12022, subd. (a)(1));

count 6, assault with a deadly weapon with use of a firearm (§§ 245, subd. (a)(2), 12022.5); count 33, conspiracy (§ 182.1); and count 13, automobile theft (Veh. Code, § 10851).

Appellant entered his plea to the above counts after an in-chambers discussion between court and counsel. The trial judge informed appellant he could receive a maximum potential sentence of 34 years and four months as the determinate term plus a life term for the attempted murder count. However, the court then stated appellant would receive an "indicated sentence" of a determinate sentence of 28 years for all counts save the attempted murder count, for which a concurrent life term would be imposed. The court also "indicated" that it would dismiss the remaining [**4] counts at the sentencing hearing pursuant to section 654.

At the sentencing hearing, the prosecution presented evidence that, after the hearing at which he entered his plea, and while in detention, appellant was found in possession of a gun and had spoken to another juvenile detainee about escaping. After considering this evidence, the court sentenced appellant to seventeen years, eight months on all counts except the attempted murder count. On that count, appellant was sentenced to a consecutive life term. Thus the sentence actually imposed was significantly harsher than the "indicated sentence" earlier described to appellant by the court.

Leave to file a late notice of appeal and an application for a certificate of probable cause were filed August 3, 1995, and thereafter granted. n3 (CT 190-94)

----------Footnotes----------

n3 The superior court previously denied an application for probable cause. However, under California Rules of Court, rule 31(d) and section 1237.5 this appeal is cognizable without a certificate of probable cause because it does not challenge the validity of the plea but contests the sentence. (See People v. Delles (1968) 69 Cal. 2d 906, 909-910, 73 Cal. Rptr. 389, 447 P.2d 629 [interpreting § 1237.5 to allow for appeal without a certificate of probable cause where the defendant asserts error in those proceedings subsequent to entry of guilty plea that determine the penalty to be imposed].)

----------End Footnotes----------

[**5]

[***294] DISCUSSION

I.

The Sentence Did Not Violate the Terms of the Plea Bargain

Penal Code section 1192.5 provides that a defendant cannot be sentenced on the basis of a plea to a punishment more severe than that specified in the plea. This statute also provides that the court is not bound to a plea bargain, but that if the court withdraws its offer, the court must allow the defendant to withdraw his plea.

Appellant contends that by sentencing him to a consecutive life term the trial court violated the plea bargain and he was therefore entitled to [*1284] withdraw his plea but was improperly denied an opportunity to do so. Appellant rests his claim almost entirely on People v. Johnson (1974) 10 Cal. 3d 868, 112 Cal. Rptr. 556, 519 P.2d 604. In that case the trial court discovered that in negotiating a plea bargain under which the defendant pleaded guilty in return for a misdemeanor sentence under a credit card forgery charge, he had concealed his true name and past criminal record. The court therefore withdrew its prior approval of the bargain and sentenced the defendant to state prison. At no time between the filing of the information and the date of sentencing did the court inform the defendant of his right [**6] under section 1192.5 to withdraw his plea; and at no time did the defendant or his counsel seek leave to withdraw the guilty plea after the bargain was disapproved. The Supreme Court reversed, directing that the defendant be advised of his right under section 1192.5 and permitted to withdraw his guilty plea and enter a new plea. The court explained that the provision in the statute declaring that if a defendant's offer of a plea bargain is not accepted by the prosecutor and approved by the court, the plea is deemed withdrawn and the defendant may enter a new plea, was held to apply to, not only an initial rejection of the defendant's offer, but also to a court's withdrawal of its prior approval of a negotiated plea. (Id., at p. 872.) The court additionally held that the defendant did not waive his right to change his plea by failing to request a change of plea after learning of the court's withdrawal of its prior approval. (10 Cal. 3d at pp. 872-873.)

The problem with appellant's argument, and the reason Johnson is inapposite, is that the trial court in this case never withdrew its approval of the plea bargain. Though the sentence actually imposed was harsher than the indicated sentence [**7] it was still within the discretion left to the court under the bargain negotiated by the parties. As the Attorney General correctly points out, the bargain in this case simply required the People to dismiss 13 counts, which was the consideration for appellant's reciprocal withdrawal of his not guilty plea and entry of a plea of nolo contendere to the remaining counts. The specific sentence on the counts appellant admitted was left to the discretion of the court. This was clearly the understanding of trial counsel. At the sentencing hearing he strenuously argued that "there's enough evidence before the court to allow the court to choose the mitigated terms in these offenses and to run the count 1 concurrent with the enormous number of other counts and their respective sentences that the court will impose." This argument concedes that the bargain left open the issue of imposing the life term concurrently or consecutively. Accordingly, we hold that appellant had no right under section 1192.5 to withdraw his plea.

This is not, however, the end of our analysis. The dispute between the parties as to the nature of the bargain raises the question whether appellant [*1285] understood the bargain at [**8] the time he entered his plea; that is, whether the plea was intelligent and voluntary and, if it was not, whether he must for that reason be provided an opportunity to withdraw his plea. [***295]

II.

Appellant Was Not Adequately Advised of the Range of Permissible Sentences

In Boykin v. Alabama (1969) 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709, the United States Supreme Court established, as a matter of constitutional law, that a plea of guilty in a felony case cannot be accepted without an affirmative showing that it was intelligent and voluntary. In re Tahl (1969) 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449, the California Supreme Court assayed the effect of the Boykin rule in this state. As stated in Tahl, the Boykin court, "while not establishing precise guidelines, makes clear that a plea of guilty cannot stand unless the record in some manner indicates a free and intelligent waiver of the three enumerated rights [i.e., the self-incrimination privilege, the right

of trial by jury, and the right of confrontation] necessarily abandoned by a guilty plea and an understanding of the nature and consequences of the plea. Clearly the judge's active participation 'in canvassing the matter with the accused' is essential, and a fortiori [**9] a silent record is insufficient." (Id., at p. 130, italics added.) Quoting with approval from Commonwealth ex rel. West v. Rundle (1968) 428 Pa. 102, 237 A.2d 196, 197-198, which had also been quoted with approval in Boykin, the Tahl court also observed that "'[a] majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged, and the permissible range of sentences.'" (In re Tahl, supra, 1 Cal. 3d at p. 133, fn. 7, italics added.)

While courts have held that a plea of guilty cannot reasonably be found to have been knowingly and voluntarily entered if the defendant is unaware of the primary and direct consequences of his imminent conviction on a plea of guilty (see, e.g., In re Birch (1973) 10 Cal. 3d 314, 319, 110 Cal. Rptr. 212, 515 P.2d 12; People v. Tabucchi (1976) 64 Cal. App. 3d 133, 134 Cal. Rptr. 245), "common sense dictates that the court need only apprise defendant of the sentence [**10] possibilities in a general fashion." (Scoggins v. Superior Court (1977) 65 Cal. App. 3d 873, 877, 135 Cal. Rptr. 619.)

People v. Spears (1984) 153 Cal. App. 3d 79, 199 Cal. Rptr. 922 and People v. Vento (1989) 208 Cal. App. 3d 876, 256 Cal. Rptr. 497 are instructive as to the extent of the judicial responsibility to advise a defendant [*1286] entering a negotiated plea of the permissible range of sentences and the consequences of the judicial failure to provide such advice. In Spears, defendants charged with numerous serious felonies entered into plea bargains under conditions in which they were permitted by the trial court to believe that probation was likely. While the court made it clear no promises were being made, it failed to disclose that the pleas made probation statutorily disfavored and therefore improbable. In the case of one defendant "the taking of the plea commenced with his counsel asking for confirmation that his client would be eligible for probation. The court responded: 'I don't read it as a mandatory prison, where the Court has no

discretion. Do you understand that?' Defense counsel responded that he agreed. The plea was then taken by a careful court which made it clear that no promises had been made, interspersed with references to [**11] 'if' the defendant should go to prison." (153 Cal. App. 3d at p. 83.) The other defendant also "was told no promises were being made. He agreed with the court's denial that neither the judge, defense counsel, nor the district attorney 'is promising you, if you plead guilty to these two things we guarantee you wouldn't go to prison, or we guarantee you will get straight probation.'" (Ibid.) After spelling out the various prison terms to which they were exposed by their pleas, "the court also warned the defendants that if given probation, the terms and conditions of probation must be observed to avoid revocation." (Ibid.) After the defendants were sentenced to state prison they moved to withdraw their pleas on the basis of "an asserted understanding by all concerned that the defendants were local businessmen whose affairs [***296] would be jeopardized if they were not given probation and an assignment to a work furlough program." (153 Cal. App. 3d at p. 84.)

The appellate court concluded that, although the defendants were advised of the maximum sentence, "references were made to probation without the slightest hint that there were statutory hurdles." (153 Cal. App. 3d at p. 87.) Declining to decide whether a court must invariably [**12] advise a defendant that a plea invokes a strong statutory presumption against probation, the court simply expressed "the need to advise a defendant that probation is disfavored when the plea and admissions make it so, and the defendant, counsel, and the court appear to consider probation 'likely.' In that situation, to avoid having to grant a subsequent motion to withdraw the plea, the court must disclose the full consequences of such a plea; it shall not consider advice of the maximum punishment permitted by law to be sufficient." (Ibid., italics in original.) Considering the policy reasons why a prejudgment motion to withdraw a guilty plea should be granted whenever there is doubt (see Pen. Code, § 1018), the court held that the trial court abused its discretion in not allowing defendants to withdraw their pleas of guilty.

In People v. Vento, supra, 208 Cal. App. 3d 876, the trial court advised the defendant of the maximum sentence he faced. "The trial court then stated, [*1287] 'Now I indicated to your attorney that should you plead guilty or be found guilty that I would not rule out the possibility of probation and local sentencing in your

case. By the same token, I would not rule out [**13] the possibility of a state prison commitment; do you understand that?' Vento stated that he did and proceeded to waive his constitutional rights and plead guilty. He indicated that he had not been promised anything in exchange for his plea other than what was stated in court, and that he was pleading guilty because he was in fact guilty." (Id., at p. 878.) The defendant contended "that the trial court's comments regarding the possibility of probation were misleading, since in fact probation could only be granted in an unusual case where the interests of justice would best be served . . ." and that he was therefore entitled to a reversal of the judgment and an opportunity to withdraw his plea. (Ibid.)

The Court of Appeal found that although Vento was not informed at the time he entered his plea that probation was statutorily disfavored, "the record does not show a climate of 'real anticipation' that probation was likely. Instead, the trial court simply indicated that it was ruling out none of its sentencing options. Moreover, unlike the defendants in Spears, at no time did Vento move to withdraw his plea." Because "there [was] no indication at the time of sentencing that Vento was [**14] surprised by the statutory limitation on probation or that he felt the plea bargain was being breached either in letter or in spirit" (208 Cal. App. 3d at pp. 879-880), the appellate court rejected his argument that his plea was improperly induced and affirmed the judgment.

In the present case, the threshold question is whether appellant understood or should have understood the permissible range of sentences contemplated by the bargain he entered; that is, whether he fully realized his exposure to the sentence he actually received. While we are aware that off-the-record plea discussions probably took place, and that the court or counsel may in that context have correctly explained the range of sentencing possibilities the plea bargain left open to the court, we cannot speculate as to what appellant may have been told; our inquiry must be confined to the record. (In re Tahl, supra, 1 Cal. 3d at pp. 130-131; People v. Spears, supra, 153 Cal. App. 3d at p. 83.) The only portion of the record that sheds light on appellant's understanding of the permissible range of sentences contemplated by the bargain he entered are the plea agreement executed on June 16, 1994 and a colloquy between the court and appellant [**15] that same day, when the court accepted the change of plea.

The form "Declaration Concerning Change of Plea To Guilty or Nolo Contendere" executed by appellant, defense counsel and the district attorney, [*1288] recites in material part that counsel explained to appellant the maximum [***297] penalty which could be imposed as a result of the plea of nolo contendere and that appellant was not "induced to plead guilty or nolo contendere by any promise or representation of a lesser sentence, probation, reward, immunity, or anything else except [and the following is handwritten]: "The court has indicated that I will be sentenced to 28 years in determinate terms with the sentence on ct. 1 to run concurrent. That is, the life term in ct. 1 plus any special allegations attached to ct. 1 will be imposed to run concurrently with the 28 years indeterminate terms imposed in cts. 4-33." (Italics added.) The use of the word "except" enhances the possibility appellant may have erroneously understood the "indicated sentence" to constitute a promise. Finally, the declaration states that "The Court reserves the right to withdraw its consent to any sentence limitation agreement; and, in the event, I will be permitted [**16] to withdraw my plea(s) of guilty or nolo contendere and all charges will be reinstated." At the bottom of the declaration, the district attorney wrote in, next to her signature, "plea is open by People."

The court accepted appellant's change of plea the same day. After admonishing appellant of the constitutional rights he would be giving up by entering a plea of nolo contendere, the following colloquy ensued:

"THE COURT: You understand that the maximum potential penalty which you could receive for the combined offenses I just indicated could be 34 years and four months in the Department of Corrections? . . . .

"THE DEFENDANT: Yes.

"THE COURT: You understand that, sir?

"THE DEFENDANT: Yes, I do.

"THE COURT: Now, in this particular instance the court has indicated and its an indicated sentence only, that you will be sentenced to 28 years with respect to the determinate terms, with the sentence on Count I, that is the life term, together with those special allegations to run concurrent to the earlier term.

"By that, I mean the life term plus the special allegations of eight years will be imposed to run concurrently with the 28 years of the determinate sentence and to be imposed [**17] by the court as relates to those counts.

"The balance of the charges to which you are not either admitting or pleading no contest to will be dismissed at the time of sentencing.

[*1289] "Is that your understanding?

"THE DEFENDANT: Yes." (Italics added.)

Whether appellant appreciated that his plea bargain allowed the possibility of the sentence he received primarily turns on whether he understood or can reasonably be deemed to have understood the court's use of the phrase "indicated sentence," as well as the word "indicated" used in the declaration concerning the change of plea. The expression "indicated sentence" refers to the sentence which, at the time the court accepts a plea of guilty, it intends or is inclined to later impose if a given set of facts were proved. (People v. Superior Court (Felmann) (1976) 59 Cal. App. 3d 270, 276, 130 Cal. Rptr. 548). An "indicated sentence" thus embodies no promise that it will necessarily be imposed. "The court may, and should, withdraw from an 'indicated sentence' if new facts are brought out at the sentencing hearing showing that the 'indicated sentence' is not appropriate." (People v. Superior Court (Ramos) (1991) 235 Cal. App. 3d 1261, 1269, citing Bryce v. Superior [**18] Court (1988) 205 Cal. App. 3d 671, 676, fn. 2, 252 Cal. Rptr. 443; People v. Johnson, supra, 10 Cal. 3d 868, 873.) Moreover, the prosecutor has the "inherent right to challenge the factual predicate and to argue that the court's indicated sentence is wrong." (People v. Superior Court (Felmann), supra, 59 Cal. App. 3d at p. 276.)

While the meaning of "indicated sentence" just described is fully appreciated by the judges, lawyers and other professionals familiar with the circumlocutions to which our criminal justice system is, unhappily, so predisposed, it is highly doubtful others share this understanding. "Words after all are symbols," Cardozo once pointed out, "and the significance of the symbols varies with the knowledge and experience of the mind receiving [***298] them." (Cooper v. Dasher (1933) 290 U.S. 106, 109, 78 L. Ed.

203, 54 S. Ct. 6.) The word "indicate" has many meanings, some of them in conflict. Nonetheless, in common usage it does not connote an aspect of tentativeness. Indeed, Webster's first definition of "indicate" is "to point or point to or toward with more or less exactness," that is, to "show or make known with a fair degree of certainty." (Webster's Third New International Dictionary (1970) at p. 1150.) n4

----------Footnotes----------

n4 The uncertainty of the word is exemplified by the various examples Webster supplies of its primary usage. Thus "indicate" is used "to show the probable presence of existence or nature or course of : give fair evidence of : be a fairly certain sign or symptom of : reveal in a fairly clear way." (Webster's Third International Dictionary, supra, at p. 1150.)

----------End Footnotes----------

[**19]

While the trial judge advised appellant he could receive a sentence as long as 34 years and four months, the record does not reveal that it was ever [*1290] explained to appellant that the lesser "indicated sentence" was provisional and, if new facts came to light, might later be repudiated by the court and the district attorney, despite their former endorsement. Consistent with the principle articulated in In re Tahl, supra, and its progeny, particularly cases relating to the need to advise of the range of sentences permitted by a plea bargain (e.g., People v. Spears, supra, 153 Cal. App. 3d 79), a trial court cannot assume that the tentative nature of an "indicated sentence," is communicated to a defendant merely through the use of that recondite phrase; the defendant must be explicitly advised, as is ordinarily done, that an "indicated sentence" does not constitute a guarantee. (See People v. Delgado (1993) 16 Cal. App. 4th 551, 554.) From all that appears in the record, by which we are bound, appellant never received such an advisement and might therefore reasonably have believed that the "indicated sentence" agreed to by the district attorney and accepted by the court was part of the bargain [**20] and therefore assured.

To one unfamiliar with the jargon employed in our criminal courts, the cryptic statement "plea is open by People," which appears handwritten at the bottom of the declaration concerning

the change of plea is no more illuminating than the phrase "indicated sentence." The uninitiated cannot reasonably be deemed to understand that an "open" plea is one that leaves sentencing discretion to the court. And even if this were understood, the statement that the plea is open "by People" suggests that condition may not have been agreed to by the defendant.

In short, so far as is shown by the record, appellant was never adequately advised of the range of permissible sentences that could be imposed under the terms of the plea bargain.

III.

Appellant Was Not Prejudiced by the Inadequate Advisement

While we conclude appellant was not adequately advised of the range of sentences he could receive under the plea bargain, the failure to give such an advisement is not reversible per se. An uninformed waiver of specified constitutional rights does not necessarily render a plea or admission voluntary. Such a plea or admission need not be set aside if the "totality of the [**21] circumstances" delineated in the record affirmatively demonstrates that the plea was voluntary and intelligent. (People v. Howard (1992) 1 Cal. 4th 1132, 1178, 824 P.2d 1315 and federal cases there cited.) Moreover, an uninformed waiver based on the failure of the court to advise an accused of the penal consequences of a plea or [*1291] admission does not violate any constitutional rights, but merely a judicially declared rule of criminal procedure. (People v. Walker (1991) 54 Cal. 3d 1013, 1022-1023, 819 P.2d 861.) Such a failure to advise therefore requires reversal only if the error is prejudicial to the accused. (Ibid., quoting In re Ronald E. (1977) 19 Cal. 3d 315, 321, 137 Cal. Rptr. 781, 562 P.2d 684.) Thus, appellant must demonstrate that it is reasonably probable he would not have entered his plea if he had not been told of the provisional nature of the "indicated sentence."

Furthermore, as also noted in People v. Walker, supra, 54 Cal. 3d at p. 1023, [***299] the error in omitting such an advisement is waived if objection is not made at or before sentencing. The purpose of the general doctrine of waiver is to encourage parties to bring objections to the attention of the trial court so that they may be avoided or cured. "Upon a timely objection, the sentencing [**22] court must determine whether the error

prejudiced the defendant, i.e., whether it is 'reasonably probable' the defendant would not have pleaded guilty if properly advised." (Id., citing People v. Glennon (1990) 225 Cal. App. 3d 101, 105, 276 Cal. Rptr. 1; see also People v. Melton (1990) 218 Cal. App. 3d 1406, 1408-1409, 267 Cal. Rptr. 640.) It is therefore significant that appellant did not move to withdraw his plea at the time of sentencing, instead the entire hearing was occupied by testimony in support of the statements in mitigation and aggravation previously submitted to the court by defense counsel and the district attorney. As the district attorney accurately stated at the close of the hearing, whether to impose the life term on count 1 concurrently or consecutively is the question "substantially at issue at this sentencing hearing."

As earlier noted, defense counsel agreed that was the issue. In People v. Vento, supra, 208 Cal. App. 3d 876, 879, where the defendant was not informed at the time he entered his plea that the probation he desired was statutorily disfavored, the appellate court considered the defendant's failure to later move to withdraw his plea an indication that he was not surprised by the prison term [**23] imposed and did not feel the plea bargain was being breached either in letter or spirit. (208 Cal. App. 3d at pp. 879-880.) So too in the present case does appellant's failure to move to withdraw his plea reflect his understanding at that time that the consecutive sentence imposed by the court was within the terms of the plea bargain. n5 Moreover, the evidence that appellant smuggled a loaded and operable 25 caliber handgun into the [*1292] juvenile hall in order to facilitate an escape, and may have committed serious new felonies for which he could have been but apparently was not separately charged, suggests he was not prejudiced by the sentence imposed.

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n5 Appellant's contention that he failed to waive his right to withdraw his plea as a result of ineffective assistance of counsel, which is improperly raised for the first time in his reply brief, is unpersuasive. As we have explained, the sentence imposed by the court was clearly within the terms of the plea bargain and a motion to withdraw on the theory it was not was sure to be denied. Moreover, if appellant were allowed to withdraw his plea, the district attorney could not only reinstate the 13 counts that had been dismissed, but could additionally charge appellant with the criminal acts he allegedly committed while in detention. For these

reasons, it would have been tactically unwise for appellant to move to withdraw his plea.

----------End Footnotes----------

[**24]

Accordingly, the judgment is affirmed.

LAMBDEN, J., and HITCHENS, J. *, concurring.

----------Footnotes----------

* Judge of the San Francisco Superior Court sitting under assignment by the Chairperson of the Judicial Council.

----------End Footnotes----------

Appendix D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED
DEC 3 1998

AARON DARIA,

Petitioner,

v.

GARY LINDSEY,

Respondent.

No. C-97-2121 THE (PR)

ORDER

INTRODUCTION

Petitioner, a State of California prisoner incarcerated at Salinas Valley State Prison, filed *a pro se* petition for a writ of habeas corpus on February 11, 1997. The petition was dismissed for failure to exhaust state remedies. The California Court of Appeal affirmed petitioner's conviction. *See* Answer to Order to Show Cause ("Answer") at 14. The California Supreme Court denied petitioner's application for direct review on December 23, 1996. On July 15, 1998, petitioner, now represented by counsel, filed an amended petition for a writ of habeas corpus containing only his single due process claim.

FACTUAL BACKGROUND

On June 16.1994, pursuant to a plea agreement, Aaron Daria entered nolo contendere pleas to sixteen felony counts including a charge of attempted murder. The plea agreement consisted of nolo contendere pleas to 16 counts, the dismissal of 17 remaining counts, and a maximum penalty' of 34 years, 4 months in determinate terms plus life term with possibility of parole on

Count 1 (attempted murder) and 8 years special allegation. Judge Lawrence Stevens of the San Mateo Superior Court conducted the voir dire at the plea hearing stating the following: [T]he Court has indicated and it's an indicated sentence only, that you will be sentenced to 28 years with respect to determinate terms, with the sentence on count 1, that is life term, together with those special allegations to run concurrent to the earlier term. [Court Transcript at 7]. Judge Stevens also stated that the court would impose judgment after receipt of reports and recommendations by the probation department, the Youth Authority, and the sentencing hearing. [C.T. at 7-8.] On February 10, 1995, at the sentencing hearing, the court heard testimony from two witnesses. The prosecution presented evidence that, after the plea hearing, and while in detention awaiting sentencing, Daria was found in possession of a gun and had spoken to another juvenile detainee about escaping. Following the testimony the court sentenced Daria to 17 years, 8 months plus a consecutive life sentence for the attempted murder charge. [C.T. at 82-85].

DISCUSSION

When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254. Petitioner alleges that he was denied his constitutional right to due process because he was (1) not advised of the possibility of receiving a consecutive sentence, (2) not advised that he could withdraw his plea, and (3) not given the opportunity to withdraw his plea before receiving a harsher sentence than that indicated by the court at time of petitioner's plea. Petitioner argues that his plea was not knowing and voluntary which violates constitutional due process.

A. COURT'S FAILURE TO INFORM PETITIONER THAT HE COULD RECEIVE A CONSECUTIVE SENTENCE BEFORE ENTERING HIS PLEA DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS.

Due process guarantees require that a defendant's guilty plea be voluntary and intelligent. *Boykin v. Alabama,* 395 U.S. 238, 242 (1969) *Torrey v. Estelle,* 842 F.2d 234, 235 (9th Cir. 1988). In determining whether a plea was voluntary, the court needs to

review all the relevant circumstances surrounding it. *Carter v. McCarthy,* 806 F.2d 1373, 1375 (9th Cir. 1986) *(citing Brady v. United States.* 397 U.S. 742, 749 (1970)). Petitioner must have been "fully aware of the direct consequences" of his plea. *Brady,* 397 U.S. at 755.

The initial inquiry is whether a consecutive sentence is a direct consequence of a guilty plea, or merely a collateral one. See *Carter v. McCarthy,* 806 F.2d 1373 (9th Cir. 1986). The Ninth Circuit consistently has held that a consecutive sentence is a collateral consequence of a plea. [fn.1] *Torrey v. Estelle,* 842 F.2d 234 (9th Cir. 1988); *see United States v. Kikuyama,* 109 F.3d 536 (9th Cir. 1997) (court's failure to inform defendant that he was subject to a consecutive sentence did not make defendant's plea involuntary); *United States v. Rubalcaba,* 811 F.2d 491(9th Cir. 1986) *(citing United Stares V. Hamilton,* 568 F.2d 1302, 1305-06 (9th Cir. 1978)) (defendant need not be told that the sentences to each count nay run consecutively); *Johnson v. United States,* 460 F.2d 1203 (9th Cir. 1972) *(citing Tibbs v. United Stares,* 459 F.2d 292 (9th Cir. 1972) and *Hinds V United States,* 429 F.2d 1322 (9th Cir. 1970)) ("sentencing court is not required to advise a defendant that prison terms could be made to run consecutively"). Since the possibility of a consecutive sentence is a collateral consequence, constitutional due process does not require the court to inform petitioner before receiving a plea.

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1. The cases that petitioner cites to support an argument that the Ninth Circuit has found consecutive sentences to be direct consequences are inapposite. The Ninth Circuit held that before accepting a guilty plea, a district court must inform a federal defendant against whom state charges are pending that a federal court lacks authority to impose a sentence to be served concurrently with a state sentence. *United States V. Neely,* 38 F.3d 458, 459 (9th Cir. 1994) *(citing United States v. Myers,* 451 F.2d 402, 403-05 (9th Cir.1972)). Unlike, *Neely* and *Myers,* the state court in this case had full discretion to Impose either concurrent or consecutive sentences. *See* [C.T. at 72].

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B. PETITIONER HAS FAILED TO

SHOW THAT HE WAS PREJUDICED BY THE STATE COURT'S OMISSION UNDER SECTION 1192.5.

Petitioner argues that his due process rights were violated when the court failed to inform him that he could withdraw his plea and failed to give him the opportunity to withdraw his plea before imposing a harsher sentence than that "indicated" by the court at his plea hearing. [fn.2] Under California law, the state trial judge must inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. CAL. PENAL CODE § 1192.5. Judge Stevens did not inform the petitioner on the record that he would be allowed to withdraw his plea before the plea was entered. This omission, however, is not a per se due process violation. *Wavne,* 690 F.2d at 687. Daria must show that he was prejudiced by not being informed that he could withdraw his plea. *Carter,* 806 F.2d at 1376 n.2 *(citing Wayne v. Raines,* 690 F.2d 685, 687 (9th Cir. 1982)). Petitioner has not shown in any way that he was prejudiced by this omission. [fn.3]. Daria contends that had he been told by the court that he could withdraw his plea if the court imposed a harsher sentence than the "indicated" sentence, he would have withdrawn his plea. But, Daria and his attorney must be held to know that the plea could be withdrawn, since directly above Daria's signature in the Plea Declaration is the following statement: "The Court reserves the right to withdraw its consent to any sentence limitation agreement; and, in the event, I will be permitted to withdraw my plea(s) of guilty or nolo contendere and all charges will be reinstated." Just below Daria's signature, Daria's attorney signed the declaration stating that he "explained the above declaration to the defendant:" Therefore, without a showing of prejudice, the state trial judge's omission in his voir dire does not constitute a due process violation.

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2. Petitioner also argues that the court did not "cause an inquiry to be made of the defendant to satisfy itself a the plea is freely and voluntarily made" as required under California Penal Code section 1192.5. However, it is clear on the record that the court ensured that the plea

was freely and voluntarily made. [C.T. at 6].

3. Petitioner erroneously applies the *Chapman* standard in this case since a state only has the burden of showing "harmless error beyond a reasonable doubt" after a determination of a constitutional error. See *Chapman v. California,* 386 U.S. 18, 87 (1967); *Carter v.McCarthy,* 806 F.2d. 1373, 1377 (9th Cir. 1986). There has been no determination of a constitutional error in this case.

---------- End Footnotes ----------

Petitioner also argues that Judge Stevens did not advise him of the opportunity nor give him the opportunity to withdraw his plea at the sentencing hearing. First, Daria does not present any support in the law for his argument that a court has an affirmative duty to instruct a defendant at the sentencing hearing that defendant's plea may be withdrawn. And contrary to petitioner argument, the record of the sentencing hearing contains no suggestion that Judge Stevens prevented either Daria or his counsel from withdrawing his plea at sentencing. In fact. neither petitioner nor his counsel objected or moved to withdraw the plea. [fn.4] Instead, petitioner presented evidence and statements to the court regarding mitigation of his sentence. Daria's attorney also conceded that "it's clear that the court has great discretion in this matter, obviously with the imposition of the sentence in Count 1..." [C.T. at 72]. Petitioner fails to show any procedural violation by the state trial judge which rises to a due process violation.

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4. The California Court of Appeal also found that Daria was not prejudiced stating that Daria's failure to move to withdraw his plea is an indication that he was not surprised by the consecutive sentence.

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CONCLUSION

Accordingly. and good cause appearing, it is HEREBY ORDERED that Petitioner's petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

DATED: 12/3/98

s/Thelton E. Henderson
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

Appendix E
California Penal Code § 1192.5

§ 1192.5. Plea of guilty or nolo contendere specifying punishment; Withdrawal of approval or plea.

Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of paragraph (2), (3), or (6) of subdivision (a) of Section 261, paragraph (1) or (4) of subdivision (a) of Section 262, Section 264.1, Section 286 by force, violence, duress, menace or threat of great bodily harm, subdivision (b) of Section 288, Section 288a by force, violence, duress, menace or threat of great bodily harm, or subdivision (a) of Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.

If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

If the plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available.

If the plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.